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**PARTNERS, NOT ADVERSARIES:
ADOPTING THE EITI TOWARDS EFFECTIVE COLLECTIVE GOVERNANCE
TO IMPROVE THE EXTRACTIVE INDUSTRY IN SOUTH AFRICA**

By

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DECLARATION BY STUDENT

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Date: 6 January 2017

ABSTRACT

On 16 August 2012, 34 mine workers were killed at Marikana, South Africa, following a stand-off with the South African Police as a direct result of a wage dispute with a multinational mining company. The Marikana tragedy has highlighted the abject poverty suffered by mining-affected communities, with both labourers and local communities demanding a stake in mining activities affecting their area. The promises of a 'better life' remain largely unfulfilled, with the consequence that many communities live in barren and polluted environments blighted by crime, unemployment and failing infrastructure.

The root of the matter lies in the age-old economic debate over natural resources endowment, more particularly as it relates to resource-dependant developing countries. One way to address this challenge is through transparency, which is not an end in itself but is fundamental in empowering an informed constituency to demand the adequate and equitable use of natural resource revenues for optimum development impact.

The Extractive Industries Transparency Initiative (EITI) could create a much-needed platform for dialogue between government, extractive companies, labour representatives and communities. However, despite continued calls to join the initiative, South Africa's government, citing various reasons, continues to refuse to subscribe to the standard. With labour agitation increasing, the country's extractive industry dwindling and local communities gaining momentum in their quests, the need for South Africa's extractive industries to be subject to greater reform and transparency is becoming a necessity.

Acknowledging the need for greater collaboration between the various stakeholders, one of the key questions asked at the Southern African Metals and Engineering Indaba in May 2016, was on how to forge a tripartite between Government, Business and Labour to improve the extractive industry in South Africa. This study submits that the focus should move to a quadripartite to also accommodate the views and contributions from the Community as a fourth pillar towards collective governance.

This study therefore explores the suitability of the implementation of the EITI as a transparency standard towards the development and fostering of a culture of co-ownership between the various stakeholders of South Africa's mining sector, with a view to achieving meaningful and effective collective governance of South African extractive industries.

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LIST OF ACRONYMS

BBBEE	Broad-Based Black Economic Empowerment
DMR	Department of Mineral Resources
EIR	Extractive Industries Review
EITI	Extractive Industries Transparency Initiative
ESMA	European Securities and Markets Authority
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FICA	Financial Intelligence Centre Act
GIFT	Global Initiative on Fiscal Transparency
IDP	Integrated Development Plan
MPRDA	Mineral and Petroleum Resources Development Act
MSI	Multi-Stakeholder Initiative
NACF	National Anti-Corruption Forum
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organization
OBI	Open Budget Index
OCP	Open Contracting Partnership
OECD	Organisation for Economic Co-operation and Development
OGP	Open Government Partnership
PAIA	Promotion of Access to Information Act
PDA	Protected Disclosures Act
POSIB	Protection of State Information Bill
PRECCA	Prevention and Combating of Corrupt Activities Act
PWYP	Publish What You Pay
PWYP-SA	Publish What You Pay South Africa
R2K	Right2Know Campaign
SDG	Sustainable Development Goal
SLP	Social and Labour Plan
TI	Transparency International
WBG	World Bank Group



KEY WORDS

Accountability

Collective

Corruption

EITI

Extractive

Governance

Initiative

PWYP

South Africa

Transparency

CHAPTER 1

INTRODUCTION, BACKGROUND AND RESEARCH METHODOLOGY

1.1 INTRODUCTION

Conflict in extractive industries, on both global and regional (African) levels, is often attributed to the lack of access to, or the poor distribution and allocation of revenues generated by the industry. The link between conflict and extractive resources have led to an increased worldwide focus on the development of public policies and modern governance structures that may create forums where the diverse interests and views of the various stakeholders are addressed without resorting to deadly conflict.¹

Collective governance and multi-stakeholderism appears to be an intrinsic part of modern governance, creating the impression that these are common practice in various industries. Yet, as reflected on by Eddie Rich and Jonas Moberg in their publication *Beyond Governments, Making Collective Governance Work*,² surprisingly few collective governance initiatives have been able to retain commitment or relevance. The application of these initiatives are of particular concern in extractive industries.

1.1.1 Global influences and perspectives

Extractive industries in any country are inevitably impacted by global developments, with macro-economic growth and international markets strongly influencing both the demand for resources and profitability. A decline in demand for various ore products, together with further challenges to profitability in the form of unfavourable commodity prices and tougher mining conditions, resulted in limiting the revenue potential of many countries. Declining ore grades at existing depths mean that mining companies have to mine deeper to reach new deposits, significantly increasing the cost of extraction. Compounding these economic and operational factors, mining companies also face regulatory uncertainty following a global trend of resource nationalism.³ On the other end of the

¹ Afful-Koomson, T., & Asubonteng, K.O. (Eds.). (2015) 1. *Collaborative Governance in Extractive Industries in Africa*. African Books Collective for UNU-INRA.

² Rich, E., & Moberg, J. (2015) Preface. *Beyond Governments, Making Collective Governance Work: Lessons from the Extractive Industries Transparency Initiative*. Greenleaf Publishing.

³ Lane, A., Guzek, J., & Van Antwerpen, W. (2015). "Tough choices facing the South African mining industry" Vol. 115, N.6. *Journal of the Southern African Institute of Mining and Metallurgy* 473.

spectrum, governments throughout the world are looking to increase their share of mining profits as a means to bolster slow economies and drive socio-economic development.

In this current market many countries have elected to implement the Extractive Industries Transparency Initiative (EITI) as an international standard to ensure transparency around their countries' oil, gas and mineral resources.⁴ Market leaders like the United States of America, the United Kingdom and recently also Australia,⁵ have all elected to implement the EITI to ensure increased transparency in how their natural resources are governed. This commitment to the full disclosure of government revenue from its extractive sectors is actively contributing to paving the road towards effective collective governance.⁶

1.1.2 African influences and perspectives

According to Lane, Guzek and van Antwerpen, mining companies looking to operate on the African continent face unique challenges.⁷ Mining companies require a degree of political stability, investment-friendliness, appropriate infrastructure, and balanced fiscal regimes to operate successfully. There are several issues prevalent across the African continent that run counter to these requirements, and which contribute to the perception of Africa as a risky destination for business. Attracting foreign investment to Africa is therefore becoming increasingly more difficult and is adversely impacted by poor governance, the prevalence or perception of corruption, tenuous legislative frameworks, fragile security of tenure, and unclear royalty and tax regimes. Furthermore, long-standing issues such as civil unrest, insurgency, and a history of ethnic conflict pose additional operational risks in certain countries.⁸

Despite many African countries' economic dependence on the mining industry, host governments and communities consistently treat mining companies with suspicion. Mining operations are viewed as operations in isolation without the necessary linkages and benefits to other sectors of the economy or alignment with local labour aspirations. Furthermore, the history of colonialism across Africa has often resulted in foreign-owned mining companies being viewed by communities as entities with no

⁴ Rogan, D. (Ed). (2016). *The EITI Standard 2016*. EITI International Secretariat.

⁵ The Australian Extractive Industries Transparency Initiative (2016). The Australian Government: Department of Industry, Innovation and Science.

⁶ Ravat, A., & Kannan, S.P. (Eds.). (2012) Preface. *Implementing EITI for Impact: A Handbook for Policy Makers and Stakeholders*. World Bank Publications.

⁷ Lane, Guzek & Van Antwerpen (2015) 475.

⁸ See *id* at 477.

long-term commitment to the country, merely interested in generating wealth and repatriating dividends, whilst leaving behind a damaged environment with little lasting benefit for the community. Amidst these socio-economic and political complexities, the EITI aims at promoting collective governance through transparency and accountability in resource-rich African countries by encouraging extractive companies to publish what they pay and governments to disclose their resource revenues so that all stakeholders can fully benefit from the revenue created.

1.1.3 South African influences and perspectives

Extractive industries in South Africa face significant challenges, putting the sector at a crossroads. In addition to the complex factors affecting mining companies at a global and African level, companies with South African operations face further complexities.

Like many other African countries, South Africa has vast mineral wealth with immense value generation potential. With more than 52 commodities under its surface, South Africa has the world's largest reserves of platinum, manganese, chrome, vanadium, and gold, as well as major reserves of coal, iron ore, zirconium, and titanium. Deloitte and Touche estimates the combined value of these resources at US\$2.5 trillion.⁹

The problem is clearly not the lack of ore in the ground, but rather the cost of getting it to the surface together with the carriage cost thereof, given South Africa's relative remoteness from main set-off points (i.e. China and India). Currently it is cheaper to mine just about anywhere else in the world. China, Australia, the United States and Russia presently edge out South Africa as the world's largest producers.¹⁰ Two contributing factors hereto is the price of labour in South Africa, together with the stringent social responsibilities placed on the mining industry by the South African government, the general labour force and local communities. In response, some firms are looking to exit the country.

Notwithstanding the apparent value that the EITI standard can add towards addressing the current challenges via meaningful collective governance between the various stakeholders of the South African extractive industry, the country continues to refrain from adopting the standard.

⁹ Deloitte Market Intelligence: Global Mining Update - May 2013: Taking the temperature of the market (2013). Deloitte & Touche.

¹⁰ Lane, Guzek & Van Antwerpen (2015) 475.

1.2 BACKGROUND TO THE RESEARCH PROBLEM

The Extractive Industries Transparency Initiative is arguably the most prominent norm of extractive industries transparency.¹¹ At the time of the EITI Global Conference held in Lima Peru in February 2016, 51 countries were officially recognised as upholding the EITI with various other in the validation process.¹² Since its inception, the EITI has developed into a multi-stakeholder coalition of governments, companies, investors, civil society organisations, and partner organisations, who have all agreed to the EITI standard and committed to publicly report the revenues that are generated from the extraction of natural resources.

Since its democratic transformation in 1994, South Africa has become increasingly assertive in continental politics and highly visible in a number of key global regulatory frameworks for the extractive sector. Yet the country remains conspicuously absent from the EITI and has resisted membership on a number of grounds, concluding that South Africa would not benefit from the initiative.¹³ This position has been widely criticized and opposition parties¹⁴ have indicated that countries that refuse to sign up to the EITI invariably do so to protect questionable interests and thereby encourage centralisation and repression¹⁵.

The underlying belief of various stakeholders that South Africans are not benefitting sufficiently from the exploitation of the country's mineral wealth reiterates the question if South Africa can afford to shun the EITI:¹⁶ an initiative that provides for the sharing of basic information that may lead to further engagement between government, civil society and the mining industry. In a market where investors can choose between various countries blessed with an abundance of natural resources, can South Africa afford to be potentially excluded from the development opportunity associated with such investment?

¹¹ Khadiagala, G.M. (2014). "The Extractive Industries Transparency Initiative (EITI)" Southern Africa Resource Watch.; Mendoza, N.B. (2016). "Why haven't more Latin American countries joined EITI?" 4 April 2016 Devex Impact.

¹² Mendoza (2016).

¹³ Bello, O. (2013). "South Africa should leverage the Extractive Industry Transparency Initiative (EITI)" 21 May 2013 South African Institute of International Affairs (SAIIA).

¹⁴ Lorimer, J. (2012). "Statement by James Lorimer, Democratic Alliance shadow minister of mineral resources, calling on SA to sign global mining initiative" 6 March 2012 Creamer Media.

¹⁵ Blaine, S. (2012). "The push for mining to be an open book" 6 March 2012 *Business Day*.

¹⁶ Holmes, T. (2013). "SA shuns transparency initiative" 22 November 2013 *Mail & Guardian*.

1.3 RESEARCH QUESTIONS

One of the key questions asked at the Southern African Metals and Engineering Indaba in May 2016, was on how to forge a tripartite between Government, Business and Labour to improve the extractive industry in South Africa.¹⁷ This study submits that the focus should move to a quadripartite to also accommodate the views and contributions from the Community as a fourth pillar towards collective governance.

This study will therefore explore the primary question whether the EITI can assist in effective collective governance of extractive industries in South Africa. Whilst analysing this primary question, the study will further aim to find answers to the following secondary questions:

- What does the concept of collective governance entail and what are the associated advantages or disadvantages thereof for the extractive industry?
- What is the current state of collective governance in the South African extractive industry and how effective are the current instruments applied?
- Can the implementation of the EITI make a meaningful contribution towards collective governance of the extractive industry and in particular in the South African context?

1.4 RESEARCH OBJECTIVES

In pursuing the answers to the research questions stated above, the objectives of this study are to:

- Examine the concept of collective governance and identify the effectiveness of the EITI in the advancement thereof.
- Examine the state of collective governance in the South African extractive industry, including the effectiveness of current initiatives and processes in place to ensure collective governance.
- Obtain insight into the viewpoints and arguments of the various stakeholders in the South African extractive industry in support of and in opposition to the implementation of the EITI.
- Draw conclusions regarding the suitability of the EITI as a transparency standard to facilitate meaningful collective governance of the South African extractive industry with a focus on the

¹⁷ SEIFSA (2016). “National Development Plan to come under spotlight at the Southern African Metals and Engineering Indaba” SEIFSA Press Release 2016/04/2. The Southern African Metals and Engineering Indaba was hosted by SEIFSA in partnership with the IDC on the 26/27 May 2016.

associated benefits and/or drawbacks related thereto.

1.5 RESEARCH METHOD

This study is based on a grounded theory approach. Research started with a comprehensive literature review from various sources. The initial part of the process scoured academic publications for information on the background, development and contents of the EITI, whilst conducting a parallel study on the concept of collective governance and the implementation thereof in extractive industries. The study then continued to identify the effectiveness of the EITI in promoting meaningful collective governance of extractive industries.

A further investigation was done on the current status of collective governance in South African extractive industries and the effectiveness of existing initiatives implemented towards the realization thereof. The next step was to analyze the arguments in supports of and in opposition to the implementation of a South African EITI. This effectively described the current state of collective governance of the South African extractive industry with a view towards ascertaining the suitability of the EITI as a collective governance standard for South Africa.

1.6 DELINEATIONS, LIMITATIONS AND STAKEHOLDERS

Literature across a broad spectrum of disciplines was investigated for the purpose of identifying relevant transparency and collective governance practices. Current practices and trends in extractive industries across the globe were also considered. For the purpose of this study, the findings were made applicable specifically to the South African extractive sector, and more particularly to demonstrate the viewpoints and perspectives of the South African government, the effected extractive industry businesses and investors, the extractive industry labour force and the South African communities subjected to mining activities.

Each stakeholder group appeared to have its own unique objectives, often conflicting with those of other stakeholders. Andrew Lane¹⁸ points out that in the (apparent) absence of the South African government implementing the necessary programs towards collective governance and transparency it would appear that it has fallen on mining companies to conduct the unenviable task of balancing the needs of these multiple stakeholders.

¹⁸ Lane, Guzek & Van Antwerpen (2015) 479.

The overarching challenge in South Africa appear to be to strike an equitable balance of interests, ensuring that mining is productive and profitable, as well as being fair to all contributing stakeholders.¹⁹

1.7 CONCLUSION

The objective of this chapter is to give a brief overview of the study. This is done by introducing the reader to the study, before briefly explaining the aim, objectives and research methodology. The rationale for the study is clarified, and the problem statements as well as research questions are described. Lastly the delimitations are noted.

The primary question explored is whether the EITI can assist in effective collective governance of the extractive industry in South Africa. The secondary questions and information required to derive an answer are further outlined.

The study follows a grounded theory approach, whereby no one source of data takes precedence over another, and thus the intention is to continuously move between the information collected via various sources of literature and stakeholder groups, in order to arrive at a grounded theory. To achieve this, the preliminary findings from the initial literature reviews are tested against the viewpoints and interests of the various target stakeholder groups to derive a unique South African perspective.

The aim of the next chapter is to provide an overview of the concept of collective governance and the application thereof within the extractive industries. Specific focus is placed on the importance of transparency towards achieving meaningful collective governance.

¹⁹ See *id* at 475.

CHAPTER 2

COLLECTIVE GOVERNANCE

2.1 CONCEPT OF COLLECTIVE GOVERNANCE

Governance is traditionally a concept associated with the processes of governing undertaken by a government or corporation. It is important to distinguish between collective (or collaborative) governance and other forms of governance.

Ansell and Gash define collaborative governance as:

“...a governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programmes or assets”.²⁰

Jeff Thindwa from The World Bank more recently defined collective governance as:

“...an innovative model of governance that is solutions-oriented with a focus on public value, where diverse stakeholders can work in partnership to improve the management of public resources and delivery of services”.²¹

Non-state stakeholder engagement and representation are key to ensuring a collaborative approach. Without this participation any attempt at collective governance will be reduced to ‘collaborative government’. As Afful-Koomson and Asubonteng²² reveal, the emphasis is on active participation of all relevant stakeholders and not just mere representation. An important way in which participation is achieved, is through multi-stakeholder initiatives (MSIs) that support a collaborative approach bringing all stakeholders together in an attempt to jointly address complex development challenges that no one party alone has the capacity, resources, or know-how to deal with effectively. It is important to note that the beneficial impact of MSIs lies not in attempting to replace or substitute the function of a government, but rather in complementing the role and functions of a government towards strengthening public sector governance.²³

²⁰ Ansell, C., & Gash, A. (2007). “Collaborative Governance in Theory and Practice” Vol 8 *Journal of Public Administration Research and Theory* 544.

²¹ Thindwa, J. (2015). “What is collective governance?” 9 July 2015 The World Economic Forum website.

²² Afful-Koomson & Asubonteng (Eds.) (2015) 15.

²³ See *id* at 23.

2.2 FEATURES OF COLLECTIVE GOVERNANCE IN EXTRACTIVE INDUSTRIES

The concept of collective governance is by no means limited to extractive industries. Ansell and Gash provide certain criteria for collaborative governance, including: public problem-solving, continuous and formalized institutional forums which aim to make decisions by consensus and multi-stakeholder (including non-state) participation whereby participants engage directly in decision-making.²⁴

The key features of collective governance applicable in the extractive industries (as identified by Afful-Koomson and Asubonteng²⁵) deserve further discussion:

2.2.1 Broader representation by all stakeholders

Collective governance should provide broader avenues for representation and participation by private stakeholders. As the emphasis is on active participation (as opposed to mere representation), it is of particular concern that labour and community stakeholders should be provided with the capacity, skills and information they need to make a meaningful contribution to the process. Small business, labour and community participants may lack understanding of, for instance, accounting principles, budgeting, revenue and expenditure management, ultimately diminishing the value of their participation towards improving financial transparency and accountability in extractive industries.

2.2.2 Formalised and institutionalised collaboration

Collective governance are differentiated from other forms of collaboration by way of the formalised and institutional manner in which stakeholders are engaged. This requirement is critical for improving legitimacy, transparency and accountability in extractive industries. In the absence of formalised interaction, initiatives are undertaken with ad hoc arrangements that fail to address persistent adversarial situations and conflicts.

2.2.3 Focus on public policy

A distinguishing feature of collective governance is its focus on public policies and issues aimed at solving problems in the public, as opposed to the private sphere. The objective is for the various

²⁴ Ansell & Gash (2007) 554.

²⁵ Afful-Koomson & Asubonteng (Eds.) (2015) 15-18. Key features identified with a focus on extractive industries on the African continent.

extractive industry stakeholders to work together by addressing common concerns and not to merely serve their own interests. Multi-stakeholder participation must aim to formulate mutually agreed plans and collectively develop and implement substantive policies.

2.2.4 Multilateral and collective decision-making

True collective governance necessitates collective decision-making and accountability of all participatory stakeholders. Consultation cannot merely consist of informing non-state stakeholders about decisions made and related implementation methods, nor would the soliciting of feedback or advice without active involvement in decision-making and implementation suffice. Intense communication and multilateral deliberation to formulate and implement decisions of common interest are required.

2.2.5 Decentralised process of problem-solving

As the governance of extractive industries is highly contentious, it is critical to obtain local input and information from all affected stakeholders. Local communities, businesses and labour organizations will be empowered by decentralizing problem-solving beyond government institutions. Active participation by all stakeholders throughout the process will furthermore ensure the support required for the subsequent implementation of decisions reached.

2.3 IMPORTANCE OF TRANSPARENCY IN COLLECTIVE GOVERNANCE

Transparency is a term and concept that has application for both the public and private sectors. With regard to the public sector, it is typical that transparency is elementarily associated with open democracy, state accountability and even public participation as a value through which to achieve these ideals. However, with regard to the private sector, transparency has been conceived by corporate practitioners and regulators as, "...the basic solution to ensuring good functioning of financial markets".²⁶

The difference between information disclosure (or reporting) and transparency needs to be noted. Information disclosure in itself does not necessarily amount to transparency and is often merely implemented to advance the social capital of extractive companies and to increase their social licence

²⁶ Maijor, S. (2011). "Market Transparency – Does It Prevent Crisis?" 29 September 2011. ESMA/2011/322. Address of the Chair of the European Securities and Markets Authority (ESMA), Vienna.

to operate, rather than seeing transparency through information disclosure as a matter of strategic importance that contributes to the national strategic interest of a country. Information disclosure by private companies can therefore amount to what can be regarded as an act of pseudo-transparency where, in certain instances, there are efforts to mislead without achieving the ideals of openness and accountability.²⁷

2.4 APPLICATION OF COLLECTIVE GOVERNANCE IN EXTRACTIVE INDUSTRIES

As stated above, MSIs play an important part in the realisation of collective governance objectives. Various public governance MSIs, including the Extractive Industries Transparency Initiative (EITI), have been adopted globally by numerous countries, all of which are expected to catalyse deeper citizen engagement, the building of trust between stakeholders and the fostering of more beneficial, sustainable outcomes.²⁸ Notwithstanding these initiatives, the practices of bribery, corruption and misappropriation of public funds in extractive industries of many countries continue.

There are currently several global anti-corruption and compliance standards that contribute in varying degrees to the improvement of collective governance, transparency and accountability in the countries in which it operate. The main global standards include:

- The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (OECD Convention);
- The United Nations Convention Against Corruption 2003;
- The African Union Convention on the Prevention and Combatting of Corruption 2003;
- The Foreign Corrupt Practices Act of 1977 of the United States of America (FCPA);
- The Bribery Act 2010 of the United Kingdom (UK Bribery Act);
- The Financial Action Task Force (FATF); and
- The Extractive Industries Transparency Initiative (EITI).

²⁷ Adeleke, F., & Ward, R. (2015). "Who's afraid of transparency? A critical appraisal of transparency as an investment imperative for the South African mining industry" *In Good Company? Conversations around transparency and accountability in South Africa's extractive sector* 34-35. The Open Society Foundation for South Africa.

²⁸ Public governance MSIs include the Extractive Industries Transparency Initiative (EITI), Open Government Partnership (OGP), Global Initiative on Fiscal Transparency (GIFT), Open Contracting Partnership (OCP), Busan Global Partnership for Effective Development Cooperation, and the Post-2015 Sustainable Development Goals (Post 2015 SDGs).

Of the main global standards the EITI operates exclusively in the extractive industries domain and is commonly accepted as the most comprehensive representation of collective governance towards transparency and accountability in the extractive sector.

2.5 CONCLUSION

In this chapter the concept of collective governance, the application thereof within the extractive industries and the importance of transparency towards achieving meaningful collective governance are discussed. The key features of collective governance in the extractive industry are outlined and the main global collective governance standards listed.

The literature reviews reflect that although collective governance has the potential to improve transparency and accountability in revenue management in resource-rich countries, extractive industries of many countries still have a long journey towards the realisation of objectives of ensuring that revenues created through the mining sector are used for national development that is sustainable, diversified and socially inclusive.

The next chapter provides an overview of the history, formation, general operation and aims and objectives of the EITI. The influence of the Publish What You Pay campaign on this process is explored, with a short discussion on the effectiveness of the EITI.

CHAPTER 3

THE EITI AS A TOOL TOWARDS COLLECTIVE GOVERNANCE

3.1 ESTABLISHING OF THE EITI

An increased academic focus in the late 1990s and early 2000s around the ‘resource curse’²⁹ and the fact that vast potential benefits of extractive industries were not being realized, intensified the global awareness of issues like increased poverty, conflict and corruption associated with the industry. As Rich and Moberg point out, these publications outlined the complexities of the governance of extractive resources and, although various remedies were discussed for addressing the issues, the general consensus was that transparency and dialogue had to form the starting point.³⁰

In addition to the above, the World Bank Group’s (WBG’s) financial and technical support for the extraction of resources was met with intense criticism from the global non-governmental community, which ultimately prompted the WBG to offer the first substantive response to the challenges confronting extractive industries. In June 2000, then World Bank President James Wolfensohn, promised to review the WBG role in the extractive sector, and mandated an investigation and report into the role of the WBG in the industry.

Subsequent to this, and at the behest of then British Prime Minister, Tony Blair, at the World Summit for Sustainable Development in Johannesburg in 2002, the UK Department for International Development convened a meeting of civil society, company and government representatives.³¹ The Extractive Industries Transparency Initiative (EITI) was subsequently officially launched in June 2003, when a Statement of Principles to increase transparency of payments and revenues in the extractive sector was agreed.³²

The WBG’s Extractive Industries Review (EIR) report was published shortly thereafter (December 2003) and specifically provided that “...the criteria of governance adequacy should be developed

²⁹ “Resource Curse” Retrieved from Investopedia website (accessed 28 October 2016). A paradoxical situation in which countries with an abundance of non-renewable resources experience stagnant growth or even economic contraction. Occurs as a country begins to focus all of its energies on a single industry, such as mining, and neglects other major sectors. As a result, the nation becomes overly dependent on the price of commodities, and overall gross domestic product becomes extremely volatile.

³⁰ Rich & Moberg (2015) 19-20.

³¹ Khadiagala (2014) 1.

³² Rogan (Ed.) (2016).

transparently and with the involvement of all stakeholders...” and included the “Promotion of transparency in revenue flows” as one of the building blocks required in the governance of extractive industries.³³ The WBG furthermore committed its support to initiatives like the EITI and the Publish What You Pay campaign to promote revenue transparency in its client countries.

3.2 RELATIONSHIP BETWEEN THE EITI AND PWYP

Publish What You Pay (PWYP) is a global network of civil society organizations that are united in their call for an open and accountable extractive industry. PWYP undertakes public campaigns and policy advocacy to achieve disclosure of information about extractive industry revenues, contracts and government budgets. Since its establishment in 2002, the global network has grown to over 800 member organizations across the world including human rights, development, environmental and faith-based groups.³⁴

Carol Kiangura in her recent article *The Coalition is King! Perspectives on the Publish What You Pay coalition model*, points out that the collective nature of PWYP is evidenced by the formation of national coalitions committing to an agreed-on purpose and shared decision making to influence an institution, whilst maintaining separate autonomy.³⁵

The EITI was created as a result of a campaign by PWYP members in 2001-2002 and PWYP has continued to play an instrumental part in ensuring that the initiative remains efficient and credible.³⁶ Proponents of PWYP points out that the EITI is a means to an end – not an objective in and of itself. To this extent PWYP members keep pushing the boundaries to ensure the continued development of the EITI.

PWYP and EITI share the same objective of increased transparency in extractive industries to promote good governance in the management of resource revenues. However, as the table below shows, there are several key differences between the two initiatives.³⁷

³³ Striking a better balance: The final report of the extractive industries review (2003). Vol 1, 45 & 47. The World Bank Group.

³⁴ About PWYP. Retrieved from the Publish What You Pay website (accessed 28 November 2016).

³⁵ Kiangura, C. (2015). “The Coalition is King! Perspectives on the Publish What You Pay coalition model” *In Good Company? Conversations around transparency and accountability in South Africa’s extractive sector* 6. The Open Society Foundation for South Africa.

³⁶ Retrieved from the Publish What You Pay website (accessed 28 November 2016).

³⁷ Van Oranje, M., & Parham, H. (2009) 54-55. *Publishing what we learned: An assessment of the Publish What You Pay coalition*. PWYP. Comparative table adapted from.

	PWYP	EITI
Participants	Membership limited to civil society organisations.	Multi-stakeholder participation including government, extractive companies and civil society.
Approach at international level	Campaigns for mandatory solutions and aims to change laws and regulations around the world to make transparency of companies and governments obligatory. Goal to create consistent global standards of information disclosure.	Country-by-country approach, working together to encourage resource-rich governments to implement EITI in line with its criteria. Voluntary for countries to sign up. EITI believes national governments should have ownership over transparency reforms.
Approach at national level	Autonomous national civil society coalitions carry out various advocacy, research and monitoring projects at country level. Where EITI is being implemented, PWYP representatives are often part of multi-stakeholder groups effecting EITI implementation and serve as the main local watchdogs of EITI.	EITI implementation overseen by a local multi-stakeholder committee. Once voluntarily adopted, it becomes mandatory for all stakeholders in each country to abide by a mandatory set of basic rules and procedures set out by EITI Board.

PWYP members use EITI as a means to increase the openness of their extractive sector and access to important information that help them hold their governments to account. In addition to supporting the effective implementation of the initiative, PWYP seeks to broaden the boundaries of EITI ensuring that the standard is both robust and ambitious.³⁸ This has resulted in the EITI standard evolving beyond revenue transparency to include, amongst others, corporate social payments, subnational transfers and recommended optional requirements that countries can choose to include in their reports.³⁹

3.3 AIMS AND OBJECTIVES OF THE EITI

The EITI is a global standard that aims to promote the open and accountable management of oil, gas and mineral resources through the publication of information relating to the industries. It seeks to strengthen government and company systems, inform public debate and promote understanding. The EITI is however not a prescription for governance of the extractive sector, but rather a tool that informs the way the sector is governed.⁴⁰

³⁸ Retrieved from the Publish What You Pay website (accessed 28 November 2016).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

The objectives of the EITI are demonstrated through the seven requirements listed in the EITI Standard, which can be summarized as follows:⁴¹

- Effective oversight by multi-stakeholder group;
- Timely publication of EITI Reports;
- EITI Reports to include contextual information about extractive industries;
- EITI Reports to include full government disclosure of extractive industry revenues, and disclosure of all material payments to government by oil, gas and mining companies;
- A credible assurance process applying international standards;
- Comprehensible, actively promoted, publicly accessible EITI Report that contribute to public debate; and
- Multi-stakeholder group to take steps to act on lessons learned and review outcomes and impact of EITI implementation.

3.4 DEVELOPMENT AND EFFECTIVENESS OF THE EITI

Since its inception in 2003 the EITI has developed from a vague disclosure initiative to a global, multi-country, multi-stakeholder forum supporting a rules-based transparency and accountability standard. The EITI initially established two core elements: (i) companies publish what they pay and governments publish what they receive in an EITI Report; and (ii) the process is overseen by a multi-stakeholder group of governments, companies and civil society.⁴²

The EITI has however progressed to ensure more transparency and accountability throughout the natural resource value chain. Although the core elements of revenue transparency from companies and governments remained, further requirements ranging from licenses and contracts, production, revenue distribution and expenditure management were added. The emphasis however is still on country ownership with a multi-stakeholder group, deciding together how their country's EITI should work and overseeing the entire process.⁴³

⁴¹ *Ibid.*

⁴² Rogan (Ed.) (2016).

⁴³ Rich & Moberg (2015) 32.

Countries who want to improve the way they manage their natural resources would therefore apply to the EITI secretariat to become a member of EITI by pledging to adhere to the EITI Standard. A country pledging to adhere to the Standard is a “Candidate”. It has two and a half years from the date of admission as a Candidate to meet the requirements. The country is then evaluated independently, and if deemed to have met the EITI requirements for transparency, becomes “Compliant”. From then on, countries are assessed every three years and can be suspended from EITI for non-compliance.⁴⁴

The diagram below depicts a simplified process flow followed by a country to establish and comply with that country’s specific EITI:



Figure 1: Process flow depicting the (simplified) progression of EITI in a country

The EITI Standard requires information along the extractive industry value chain from the point of extraction, to how the revenue makes its way through the government, to how it benefits the public. This includes how licenses and contracts are allocated and registered, who the beneficial owners of operations are, fiscal and legal arrangements, volumes produced, amounts paid, the allocation of revenues, and the overall contribution to the economy, including employment.⁴⁵

In their recent publication Moberg and Rich draw on lessons from the EITI and reflect that they were concerned that the EITI’s focus on revenue transparency would result in the initiative becoming irrelevant when it was clear that the debate had moved on. The authors however confirm that by 2015 the “...debate had clearly shifted and transparency was no longer an aspiration. It was an expectation. And through collective governance, it was beginning to lead to accountability”.⁴⁶

⁴⁴ Rogan (Ed.) (2016).

⁴⁵ Retrieved from the Extractive Industries Transparency Initiative website (accessed on 11 October 2016).

⁴⁶ Rich & Moberg (2015) 20. Jonas Moberg and Eddie Rich have been directly involved in the development of the

3.5 CONCLUSION

This chapter provides an overview of the historical events and influences leading up to the launch of the EITI in 2003. The relationship between the EITI and the Publish What You Pay campaign is outlined, and the aims and objectives, development and effectiveness of the EITI are briefly discussed.

Although the initial application of the EITI was limited to the publication of revenues paid and received from extractive industries, the initiative has since evolved and continues to develop and broaden its scope to ensure that the standard remains the most prominent global norm of transparency in the extractive industries.

The next chapter provides a summary of the historical influences leading up to the status quo pertaining to collective governance within South African extractive industries. The main South African governance instruments and initiatives applicable to the industry are explored, to establish the effectiveness thereof towards achieving transparency as a core element of collective governance.

EITI as Head and Deputy Head of the EITI respectively.

CHAPTER 4

COLLECTIVE GOVERNANCE IN SOUTH AFRICAN EXTRACTIVE INDUSTRIES

4.1 HISTORICAL INFLUENCES

The extractive industry has historically been a very important sector of the South African economy, with the industry's substantial wealth supporting the country's growth with strong resource exports and job creation. The political and institutional environment of transparency and accountability in South Africa have however been tainted by a history of mistrust and opacity.

South Africa, in political terms, have two separate histories, one pre-apartheid and one post-, with the extractive sector intimately woven into both. Tim Hughes in his article *South Africa: A Driver of Change*, reflects that within both histories, neither transparency nor accountability were prominent, let alone dominant, drivers.⁴⁷

Prior to the abolishment of apartheid, extractive industry capital was almost exclusively under the control of white dominated, South African and international, extractive companies. The apartheid regime, professing 'government knows best' restrictions, actively cultivated a legal, political, constitutional and policy environment of opacity and non-accountability. The perception that business benefitted and profited at the expense of the general South African community resulted in a legacy of mistrust and scepticism between the post-apartheid government and extractive companies.

Significant trends relevant to transparency and accountability have emerged post-apartheid, with the democratic transformation in 1994 bringing along new (and often unique) challenges pertinent to South African extractive industries:⁴⁸

- The ruling African National Congress (ANC), without previously being allowed to freely compete for political power in a national election, was never subject to constitutional or public mechanisms of accountability;
- The ANC's legacy of persecution by the former white regime prompted ANC leadership to promote a culture of secrecy, opacity, suspicion and lack of public accountability;

⁴⁷ Hughes, T. (2012) 2. *South Africa: A Driver of Change*. The Transparency and Accountability Initiative, The Revenue Watch Institute.

⁴⁸ See *id* at 2-3.

- The growth in national inequality in South Africa has resulted in the country being the most unequal society globally;
- The capturing of the state apparatus by the ruling ANC, potentially excluding other stakeholders;
- The emergence and growth of a black middle and upper class, almost invariably connected to the ruling party at senior levels. Although this is not unusual, the distinction in South Africa is the degree of alignment between party elite and new business elite, which appears to form an important element in securing financial success in both private and public sectors; and
- Although the series of codes instituted by the government for ensuring black economic empowerment supports the award of contracts to previously disadvantaged individuals, it has invariably benefited a relatively small number of politically-connected black entrepreneurs, who could accrue wealth rapidly - particularly from the extractive sector.

Although debate in post-apartheid South Africa regarding the politics of the extractive sector has been controversial and intensive, with topics like transformation, black economic empowerment and the nationalization of mines dominating discussions, very little focus has been afforded to explicit attempts to execute collective governance principles to enhance transparency and accountability in the sector.

4.2 MAIN SOUTH AFRICAN GOVERNANCE INITIATIVES/INSTRUMENTS

Various instruments and initiatives have been implemented in South Africa with the aim of ensuring higher levels of transparency and accountability in governance. These include legislation, government initiatives executed by specific departments and civil society initiatives. The governance of the extractive industry sector is mainly executed by the Department of Mineral Resources and Department of Energy with support from the Department of Finance.

Specific instruments and initiatives find application in the extractive industry sector of South Africa:

4.2.1 South African legislation

- The Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution)⁴⁹ guarantees transparency through the free flow of information, and Section 32 of Chapter two

⁴⁹ The Constitution (1996). Section 32.

specifically provides that:

Everyone has the right of access to –

- (a) any information held by the state; and
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.

National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

Huges confirms that when added to other guaranteed freedoms, (such as the right to a safe and healthy environment, free expression, labour rights, and the right of protest and assembly), the information clause greatly increases the chances of transparency and accountability in the extractive sector.⁵⁰

Chapter nine of the Constitution furthermore provides for a number of “State Institutions Supporting Democracy”, most notably the Public Protector and the Auditor General. Regrettably the performance and vigilance of the Public Protector has been uneven due to severe funding constraints, which in itself raises questions about the government’s commitment to good governance.⁵¹

- The Promotion of Access to Information Act 2 of 2000 (PAIA)⁵² gave effect to the constitutional requirement to install freedom of information by way of national legislation.

The PAIA states in its preamble:

“BEARING IN MIND THAT- the State must ...

IN ORDER TO- foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;

actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights...”

Although the promulgation of the PAIA was a significant breakthrough and has been relied upon by NGOs, political, social and environmental activists and private citizens, the practice of the state has at times been at variance with the spirit of the act.⁵³

⁵⁰ Hughes (2012) 4.

⁵¹ See *id* at 5.

⁵² PAIA (2000).

⁵³ Hughes (2012) 5. Tim Huges points out that the passage and operation of the PAIA contrasts sharply with the introduction by the Minister of State Security (Intelligence Services) of the POSIB.

- The Protection of State Information Bill (B6B-2010) (POSIB)⁵⁴ is a draft law in South Africa that is intended to repeal the Protection of Information Act 84 of 1982. It is a highly controversial piece of proposed legislation which aims to regulate the classification, protection and dissemination of state information, weighing state interests up against transparency and freedom of expression.

While critics⁵⁵ of the bill have broadly accepted the need to replace the 1982 Act, they argue that the new bill does not correctly balance competing principles, and point to a number of provisions that undermine the right to access information and the rights of whistleblowers and journalists. As stated by Busi Chimombe from the South African Broadcasting Corporation: “The debates on what are the best mechanisms to ensure freedom of the press and protect the individual's rights to human dignity and privacy, will no doubt rage on in South Africa's new dispensation - with people on various sides of the debate seeming to agree on one thing - never again will the repression and secrecy of the apartheid era be allowed”.⁵⁶ The bill was therefore sent back to the National Assembly for reconsideration in September 2013 and President Jacob Zuma continues to refuse to sign the bill into law.⁵⁷

In relation to the extractive industry, given that a lot of corporate information regarding resource extraction can be tied to secret state information, the passing of the bill may ultimately impede the public's ability to hold the state and the extractive business sector accountable. There appears to be a need for an institution that involves active participation by all stakeholders in terms of protecting the rights of ordinary citizens and businesses.

- The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)⁵⁸ provides for strengthening of anti-corruption measures, investigation and criminalisation of corrupt activities, and extraterritorial application of the act in combating corruption. A significant anti-corruption initiative resulting from the act is the requirement for the Minister of Finance

⁵⁴ POSIB (2010).

⁵⁵ Critics of the bill have included a wide range of public organisations: the Right2Know campaign; COSATU; opposition political parties of South Africa; SANEF (South Africa National Editors' Forum); the Nelson Mandela Foundation, as well as international advocacy organisations such as Committee for the Protection of Journalists and Human Rights Watch.

⁵⁶ Chimombe (2015).

⁵⁷ Chimombe, B. (2015). “New laws won't contravene freedom of expression: Zuma” 18 October 2015 SABC News.

⁵⁸ PRECCA (2004).

to establish a register for tender defaulters within the Office of the National Treasury.⁵⁹

This initiative had the potential to bring greater levels of transparency to the public sector. However, due to failure of maintenance of the register such a positive result was not realised. Access to this register is furthermore dependent upon personal internet connection, limiting access by various municipalities and public society. The initiative thus fell short with regard to being an effective means of combating corruption.⁶⁰

- The Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA)⁶¹ is targeted at the management of mineral and petroleum resources in South Africa and may assist in enhancing transparency in the extractive sector. The MPRDA aims “To make provision for equitable access to and sustainable development of the nation’s mineral and petroleum resources; and to provide for matters connected therewith”.⁶² Although the act speaks to matters of good governance, it does not directly provide tools that the public can use to access information related to the extractive sector. According to Compaoré the implementation of the MPRDA has been more successful in illustrating the power of the state to access extractive companies’ information, and to use such information accordingly, such as the revoking of corporate licenses, than in securing effective disclosure of information.⁶³

The MPRDA does not comprehensively address transparency in extractive industries. This is to be expected as the MPRDA focuses on regulating corporations, with no equal check on the role of the state. The role of civil society is furthermore relatively absent, with civil society organizations, labour unions and local communities not being provided with the means to access relevant information on extractive companies or on corporate-state activities in the extractive sector.⁶⁴

Section 22(e) of the MPRDA does however require the applicant for a mining right to submit a Social and Labour Plan (SLP), the objectives whereof include the promotion of economic

⁵⁹ See *id* at Section 29.

⁶⁰ Mosselini, K. (2013) 37. *Anti-Corruption Initiatives in South Africa since 1994: A critical evaluation*. LLM thesis, University of the Western Cape.

⁶¹ MPRDA (2002).

⁶² See *id* at Preamble.

⁶³ Compaoré, N. (2013) 9. *Towards Understanding South Africa's Differing Attitudes to the Extractive Industries Transparency Initiative and the Open Governance Partnership*. Occasional paper No 146: Governance of Africa's Resource Programme. South African Institute of International Affairs.

⁶⁴ *Ibid*.

growth and socio-economic development of all South Africans.

The SLP system, together with Broad-Based Black Economic Empowerment (BBBEE) schemes under the Mining Charter, is the main mechanism by means of which mines are to channel the proceeds of mining into benefits for the community. The SLP contains proposed programmes that should offset the negative impacts of the mines and improve the quality of life for both mine employees and mine-affected communities.

Snyman and Krause show that in practice, however, the benefits from the mineral wealth extracted are still primarily enjoyed by investors and mining companies and not by the workers and communities.⁶⁵ When the communities receive benefits, they are often insufficient, unsuitable or are usurped by the traditional leadership structures that are designated as community representatives.

4.2.2 The Open Government Partnership

The Open Government Partnership (OGP) is a multilateral initiative that aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. In the spirit of multi-stakeholder collaboration, the OGP is overseen by a Steering Committee including representatives of governments and civil society organizations.⁶⁶ South Africa is one of the eight pioneering states to have officially launched the OGP in September 2011, with membership since having grown to a total of 75 countries.⁶⁷

Right from its outset the OGP was dominated by European countries and incorporated the participation and leadership of important global north players, such as the United States of America and the United Kingdom. In sharp contrast, the US and UK only became members of the EITI in 2014, whilst the EITI gained overwhelming support from African countries.⁶⁸ It is therefore significant that South Africa, having been an active member of the OGP since its launch, remains absent from the EITI.

⁶⁵ Snyman, L., & Krause, R. (2015). "Do Social and Labour Plans belong to the Communities? Clarity, accountability and responsiveness in the legislative framework" *In Good Company? Conversations around transparency and accountability in South Africa's extractive sector* 17. The Open Society Foundation for South Africa.

⁶⁶ About the Open Government Partnership. Retrieved from the OGP website (accessed 4 December 2016).

⁶⁷ *Ibid.*

⁶⁸ The core difference between the two initiatives centres around the fact that, unlike the EITI, the OGP is general in nature and not specific to the extractive sector, and the OGP as such does not make direct provision for corporate commitment to transparency.

4.2.3 The National Anti-Corruption Forum

The National Anti-Corruption Forum (NACF) was established to combat and prevent corruption, build integrity and raise awareness, and was launched in South Africa on June 15th, 2001. The NACF is comprised of three sectors, namely civil society, business and government, with each sector represented by ten members nominated by their respective constituencies.⁶⁹

The constant delays of this initiative coming into full operation however frustrated potential positive results in combating corruption. Levels of corruption furthermore continue to rise since the inception of the Forum and South Africa's Transparency International Corruption Perceptions ranking has declined: from a score of 5.62 out of 10 in 1995 with a continued decline to 44 out of 100 in 2015.⁷⁰ Although the formation of the NACF represent a more evolved stance in fighting corruption with its attempt at collective governance, it still has a long way to go towards satisfactorily addressing this issue.

4.2.4 The Right2Know Campaign

The Right2Know Campaign (R2K) was launched in August 2010 and has grown into a movement centred on freedom of expression and access to information.⁷¹ The R2K operates as "...a democratic, activist-driven campaign that strengthens and unites citizens to raise public awareness, mobilize communities and undertake research and targeted advocacy that aims to ensure the free flow of information necessary to meet people's social, economic, political and ecological needs and live free from want, in equality and in dignity".⁷²

In keeping with this commitment, the R2K Campaign focuses on stopping secrecy in the flow of information, ensuring that public and private sector information is easily accessible to citizens, and promoting communication rights in South Africa by ensuring access to free and diverse range of public, private and non-profit media and affordable, open and secure internet and telecommunications.

Although civil society organizations are delivering impressive advocacy work on transparency through

⁶⁹ About the National Anti Corruption Forum. Retrieved from the NACF website (accessed 22 November 2016).

⁷⁰ Transparency International: Corruption Perceptions Index (2015). Retrieved from the Transparency International website (accessed 7 December 2016). First launched in 1995, the Corruption Perceptions Index has been widely credited with putting the issue of corruption on the international policy agenda.

⁷¹ About the Right2Know Campaign. Retrieved from the R2K website (accessed on 4 December 2016).

⁷² *Ibid.*

the R2K Campaign, a specific focus on transparency in the extractive industry sector has yet to be clearly articulated by the campaign.

4.2.5 The Publish What You Pay Campaign-South Africa

A positive move towards transparency was made with the recent launch of Publish What You Pay South Africa (PWYP-SA) in 2016, consisting of a coalition of 11 members.⁷³ The overall goal of the coalition is “...to ensure (that) mandatory disclosure of financial and non-financial information across the extractives value chain is achieved...” by following a coalition ethos founded on the principles and values of (*inter alia*) participation, transparency and accountability.⁷⁴

The PWYP-SA campaign supports the belief that increasing transparency in the extractive sector will enable citizens to hold the South African government and extractive companies operating within the country to account for the ways in which natural resources are managed.⁷⁵

The PWYP-SA mission stands for a more transparent and accountable extractive sector, that enables citizens to have a say over whether their resources are extracted, how they are extracted and how extractive revenues are spent. In order for this to be realized, PWYP-SA accepts that a higher level of transparency is required in the sector, including the publication of contracts and accessibility thereof to the public for scrutiny, the publishing and tracking of revenue payments and receipts, and providing communities with all the information they need to make an informed choice about whether to move ahead with proposed extraction.⁷⁶

4.3 EFFECTIVENESS OF EXISTING GOVERNANCE

It appears that diverging perceptions exist about the state of transparency and corruption in South Africa. South Africa was positioned third in the Open Budget Index (OBI) Survey of 2015 with a score of 86 out of 100.⁷⁷ This suggests that South Africa discloses extensive information on its budget, and

⁷³ The 11 members at launch of the PWYP-SA consist of: Centre for Applied Legal Studies at Wits University; Economic Justice Network of FOCCISA; Human Rights Development Initiative; Mining Affected Communities United in Action; Open Democracy Advice Centre; ONE Campaign Open Society Foundations; South Africa Oxfam South Africa; Southern Africa Green Revolutionary Council; Studies on Poverty and Inequality Institute; Wonderkop Land Claims Committee.

⁷⁴ Retrieved from the South African webpage at the Publish What You Pay website (accessed 28 November 2016).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Open Budget Index Ratings (2015). Retrieved from the International Budget Partnerships website (accessed

therefore has a very transparent budget. In contrast, South Africa ranked poorly on the Transparency International (TI) Corruption Perceptions Index 2015, ranking 61st out of 168 countries and territories worldwide, with a low score of 44 out of 100.⁷⁸ One reason for this discrepancy relates to the fact that the OBI is specific to budget transparency, whereas the TI's index, in addition to being more comprehensive in nature, focuses not on transparency itself, but also on corruption.

Investigations into various spheres of South African governance indicate instances of highly irregular spending, maladministration, corruption, fraud and considerable financial loss being suffered by the people of South Africa. The South African government has implemented various measures dedicated towards combating corruption.⁷⁹ These have however had very little impact on the eradication of corruption within the public sector.

Against this background, Nadège Compaoré in her article on *South Africa's Differing Attitudes to the EITI and the OGP*, reflects on the question whether South Africa is justified to invoke the transparency frameworks (both local and global) that the country has adopted and which are general in nature, as an alternative to joining the EITI.⁸⁰ Although South African legislation, instruments and initiatives are currently in place to govern corruption and promote transparency and accountability, they all operate on a more general level and lack direct focus on ensuring transparency in the extractive industry.

Whilst lessons can be learned through a general standard for transparency such as PAIA, the oil, gas and mining industries hold unique requirements as far as licensing rights, contract agreements and social responsibility are concerned. Although the Constitution and the PAIA have attempted to provide a sensible way of thinking about transparency in the private sector, Adeleke and Ward comment that recent legislative developments suggest that the modest attempts and successes of 20 years ago have been reversed by curtailing reliance on the PAIA in the private sector, as well as the narrow understanding of transparency as an investment imperative without consideration for its importance for local mining communities.⁸¹

15 December 2016).

⁷⁸ Transparency International: Corruption Perceptions Index (2015). Retrieved from the Transparency International website (accessed 7 December 2016).

⁷⁹ In addition to the instruments/initiatives mentioned in paragraph 4.2 *supra* the South African government also ratified the United Nations Convention Against Corruption on the 22nd of November 2004, protect whistle-blowers by means of the Protected Disclosures Act 26 of 2000 and aim to prevent monetary fraud by means of the Financial Intelligence Centre Act 38 of 2000.

⁸⁰ Compaoré (2013) 5.

⁸¹ Adeleke & Ward (2015) 34.

Snyman and Krause identifies the access to information as an essential prerequisite for meaningful participation in the extractive industries, but comments that instruments like the Social and Labour Plans (SLPs) are often not readily available to many communities.⁸² The effect of this information blockage is significant. Communities seeking to assess whether companies have met their commitments are frequently compelled to use the process outlined in PAIA, which is often protracted and saps limited resources. It can also erode trust between the community and mining companies and therefore lead to growing tensions.⁸³ The legislation is particularly unclear about whether SLPs, approved amendments thereto, and annual compliance reports are to be publicly available as a matter of right. This allows the perpetuation of the status quo.

While ostensibly designed to ensure a more equitable sharing of the burdens and benefits of mining development, the many lacunae in the current legislative frameworks allow both the government and mining companies considerable discretion on key matters such as public participation and the dissemination of information. The result is that, in practice, existing instruments falls short of assisting the intended beneficiaries of the system.

4.4 CONCLUSION

This chapter explains in what manner South Africa's political legacy has influenced the current situation pertaining to collective governance, and more specifically transparency, within the country's extractive industries. Although the post-apartheid regime has introduced significant legislation towards transparency and accountability, this era has also brought about new challenges in the South African context. It is found that the pre-apartheid perceptions of mistrust and opacity are continued under the new democratic dispensation with global index scoring reflecting diverging perceptions about the state of transparency and corruption in South Africa.

The main South African governance instruments and independent initiatives applicable to extractive industries are outlined and the effectiveness thereof towards achieving transparency as a core element of collective governance discussed. It is found that, whilst South Africans have a constitutional right to access to information, which right is supported by various legislative directives, this right is often infringed. The current transparency regime regulating the public and private sectors, including the mining industry, is focused largely on enhancing information disclosures to the government, corporate company shareholders or investors, rather than more broadly to all

⁸² Snyman & Krause (2015) 21.

⁸³ *Ibid.*

stakeholders, which would include the general public, labour representatives and local communities.

Although civil society initiatives and organizations like the R2K Campaign and the recently formed PWYP-SA coalition are constantly exerting pressure towards ensuring transparency, current legislation and government support towards ensuring appropriate disclosure of information, including revenues paid and received from the extractive sector, remain elusive. As a result, it is found that an opportunity is lost to improve public trust and accountability in the South African extractive sector, as information disclosure to stakeholders and the general public is not a specific legislative provision.

The next chapter provides some insight into the varying arguments in support of and in opposition to the implementation of a South African EITI and critically evaluates the validity thereof.

CHAPTER 5

PERSPECTIVES ON IMPLEMENTING THE EITI TOWARDS COLLECTIVE GOVERNANCE OF SOUTH AFRICAN EXTRACTIVE INDUSTRIES

5.1 INTRODUCTION

The argument that South Africa complies with a number of reporting standards and that domestic arrangements are deemed sufficiently robust to safeguard extractive revenues from abuse, is often raised. In addition to this antagonists against the implementation of the Extractive Industries Transparency Initiative (EITI) have submitted various arguments pertaining to the relevance and limited application of the standard. This study will be limited to the main arguments in opposition to and in support of a South African EITI.

5.2 MAIN ARGUMENTS IN OPPOSITION TO THE IMPLEMENTATION OF THE EITI

5.2.1 Adequacy of existing governance processes and instruments

Supporters of this viewpoint would argue that South Africa has been extracting minerals and metals on an industrial scale for some 150 years and its domestic regulations and processes are adequately transparent.⁸⁴ The spokesperson for the Department of Mineral Resources (DMR), Ayanda Shezi, confirmed in 2013 that South Africa has not reconsidered signing up to the EITI as the country has a fiscal regime that is redistributive and has put in place adequate governance procedures and systems of accountability to sufficiently account for revenue generated and distributed.⁸⁵

In light of domestic political consideration, South Africa's overarching policy concern has further been adapted (since the abolishment of apartheid) to align with the redistribution and redress of historical imbalances in the ownership of and benefits from the country's mineral wealth.

According to the DMR the promulgation of the Mineral and Petroleum Resources Development Act (MPRDA) ensures that natural resources are a heritage of the people of South Africa and enables the state to exercise its sovereignty over the development thereof.⁸⁶ Although the act speaks to matters

⁸⁴ Hughes (2012) 9.

⁸⁵ Holmes (2013) 2.

⁸⁶ See *id* at 3.

of good governance, it however lacks providing the necessary tools that the public can use to access information related to the extractive sector.

The Promotion of Access to Information Act (PAIA), in giving effect to the constitutional requirement to install freedom of information by way of national legislation,⁸⁷ theoretically suggests that South Africa has a strong legal framework, facilitating access to information. Section 32 of the Constitution does however not provide for access to information directly held by entities such a corporations, unless such information can be accessed through the state. Since information cannot be sought if held by extractive multinationals that operate independently from the government, the EITI's objective of reconciling revenues and payments cannot be met within the PAIA structure.⁸⁸

It would appear that both the MPRDA and the PAIA are utilized more as tools in the hands of government to compel compliance by companies rather than as a lever for citizens to force disclosure of government-held information on contracts. As an example hereof, many extractives contracts are still classified as state secrets in South Africa.⁸⁹

As stated above,⁹⁰ South Africa's choice to be part of the Open Government Partnership (OGP) and not the EITI, appears puzzling since the same justifications of alternative local transparency frameworks apply. Both the OGP and PAIA are general in nature and as advised by Compaoré,⁹¹ the EITI would be a complementary framework to PAIA (and indeed to the OGP), given its focus specifically on the extractive sector – a focus that does not exist within South Africa's domestic transparency mechanisms such as PAIA. As such, this argument for South Africa's absence from the EITI can be "...largely understood as political and ideological rhetoric that are not substantiated".⁹²

5.2.2 EITI application is reserved to the developing world

South Africa's reluctance to join the EITI partly derives from its government's self-image and conception of South Africa's global role.⁹³ Most northern states originally refused to accede to the EITI, with its membership mostly consisting of developing states from the global south. By 2013 Africa

⁸⁷ The Constitution (1996). Chapter 2, Section 32.

⁸⁸ Bello, O. (2013). "SA can cast light on dark side of mining" 24 May 2013 *Mail & Guardian*.

⁸⁹ *Ibid.*

⁹⁰ *Supra* 4.2.3.

⁹¹ Compaoré (2013) 8.

⁹² *Ibid.*

⁹³ Bello, O. (2013). "South Africa should leverage the Extractive Industry Transparency Initiative (EITI)".

accounted for 21 of the EITI's 31 member countries, endorsing the perception that the initiative was mainly aimed at developing countries.⁹⁴

A similar 'misconception' as to the application of the EITI appears to exist in Latin American countries. Of the 51 countries that were officially designated as upholding the EITI at the beginning of 2016, only four were from South and Central America.⁹⁵ The EITI was originally seen as an instrument pushed by developed countries who were themselves not part of the initiative, creating a stereotype that the EITI was reserved for very poor or poorly governed countries.⁹⁶

But a major transformation has since taken place in the EITI. Where the EITI previously counted Norway as its only developed country member, the initiative has proceeded to draw a number of influential northern states into its orbit. Although the United Kingdom (the country most instrumental in the EITI's founding) initially refrained from joining, Prime Minister Cameron in May 2013 (at a joint press conference with French President Hollande) announced both the UK's and France's commitment to the standard.⁹⁷ The EITI has subsequently been implemented by other market leaders like the United States of America, Australia and Germany.⁹⁸ It is clear that although the EITI started out as an initiative to improve transparency and accountability in developing countries that faced large challenges in their extractives sectors, resource-rich OECD countries⁹⁹ have also started to see the benefits of implementing this global transparency standard.

As more G8 countries come on board, the EITI's global playing field is being levelled and negative connotations associated with restraining poorly-governed countries are being removed.¹⁰⁰ The argument that South Africa, with its mature mining economy and advanced revenue collection system should not have to join the EITI when other developed countries are not under the same political pressure to sign up, no longer holds ground.

⁹⁴ Rogan (Ed.) (2016).

⁹⁵ These include Columbia, Guatemala, Honduras and Peru.

⁹⁶ Mendoza (2016).

⁹⁷ The United Kingdom EITI webpage. Retrieved from the Extractive Industries Transparency Initiative website (accessed on 11 October 2016).

⁹⁸ The Australian EITI webpage. Retrieved from the Australian Extractive Industries Transparency Initiative website (accessed 27 September 2016). The Australian government on 6 May 2016 announced that it would implement the EITI.

⁹⁹ Although not a member, South Africa is one of the many non-member economies with which the OECD has working relationships. The Organization for Economic Co-operation and Development (OECD) Council has strengthened OECD cooperation with South Africa through "Enhanced Engagement" programmes. South Africa therefore, as a Key Partner, contribute to the OECD's work in a sustained and comprehensive manner.

¹⁰⁰ Khadiagala (2014) 3.

5.2.3 South Africa does not suffer the resource curse

The South African government further argues continued abstinence from the EITI as the country apparently does not suffer the ‘resource curse’ that often afflicts resource-rich developing countries.¹⁰¹ Peter Leon, in his former capacity as head of Webber Wentzel Bowens’ Africa mining and energy projects practice, however points out that the resource curse is characterized by bloody conflict, lower economic growth relative to other countries with fewer natural resources, endemic corruption, a ‘two-speed’ economy and poor governance.¹⁰² It is clear that this argument can be refuted in South Africa on a number of areas.

5.2.4 Additional administrative and reporting burden

The Australian government upon indicating its acceptance of the EITI in May 2016, conceded that “...companies affected by the EITI will likely bear an additional reporting and administrative burden as a result”.¹⁰³ It is however noted that as many global mining companies already participate in EITI-compliant reporting processes around the world the impact on the extractive business sector should be easily absorbed.

The same rings true for South Africa with many of the major mining houses having a multi-national presence, already adhering to the requirements of the standard. The cost of implementing the initiative in South Africa will depend on the scale of it, which payments would be included and how many companies and levels of government would need to report. It is however accepted that the benefits associated with the implementation of the EITI far outweighs the administrative cost and burden thereof.¹⁰⁴

5.2.5 Relevance of the EITI

Oxfam spokesperson, Ian Gary, during the EITI’s Global Conference in Lima, Peru in February 2016, called on the EITI Board and stakeholders to regain its position as leader in reforming the industry,

¹⁰¹ Blaine (2012).

¹⁰² *Ibid.*

¹⁰³ Van der Walt, A., Wiese, P., & Jasmat, D. (2016). “Australia signs up to the Extractive Industries Transparency Initiative (EITI)” 12 May 2016 *Lexology Newsfeed*.

¹⁰⁴ Sturman, K. (2015). “Should Australia sign up for the EITI?” 18 February 2015 *Centre for Social Responsibility in Mining*. University of Queensland, Australia.

stating that the EITI is “facing a crisis of relevance and legitimacy”.¹⁰⁵ Whilst the EITI has raised minimum transparency standards for the extractive industries, it appears to have struggled to remain at the cutting edge of reform.

Transparency International’s (TI’s) annual reports on corruption indicate that EITI compliant countries do not necessarily fare better than their non-subscribing peers.¹⁰⁶ Gilbert Khadiagala in his 2014 article on the EITI, reported that although the EITI supported transparency in revenue flows between companies and states, it was incapable of policing how officials eventually made use of payments contributed by extractive companies.¹⁰⁷ This was mainly due to the EITI’s focus being limited to one facet of the value chain (transparency and revenue collection) and not addressing upstream activities, such as procurement, or the distribution of income and public expenditure derived from extractive industries.

The same question of relevance appears to form the most pertinent explanation for the absence of many Latin American countries from the EITI. Mendoza points out that environmental conservation and local community rights are among the most burning issues in South and Central America, both of which don’t feature prominently in the EITI requirements.¹⁰⁸

But, even without expanding into environmental disclosures, the EITI standard continues to evolve. Rich and Moberg note three priority areas for future development of the EITI, including a shift of focus from the disclosure to the use of data, to improve performance beyond compliance and to link EITI implementation to international and national reform efforts.¹⁰⁹

5.3 MAIN ARGUMENTS IN SUPPORT OF THE IMPLEMENTATION OF THE EITI

5.3.1 Building of trust relationship

South Africa ranked 61st out of the 187 countries listed on Transparency International’s 2015 corruption index¹¹⁰ and a staggering 83% of urban South Africans polled by market research company

¹⁰⁵ Oxfam International (2016). “Oil, gas and mining transparency initiative facing crisis of relevance and legitimacy: Oxfam” 23 February 2016 Oxfam International.

¹⁰⁶ Transparency International: Corruption Perceptions Index (2015).

¹⁰⁷ Khadiagala (2014) 2.

¹⁰⁸ Mendoza (2016).

¹⁰⁹ Rich & Moberg (2015) 29-32.

¹¹⁰ Transparency International: Corruption Perceptions Index (2015).

TNS in 2011 were found to believe that corruption was a way of life in South Africa, while 85% believed that there was corruption at senior levels in the public service.¹¹¹ Corruption was also rated as the third biggest problem in the country after poverty and unemployment, and crime.

Democratic Alliance (DA) spokesperson on minerals and resources, James Lorimer, points out that South Africa's failure to sign up to the EITI would suggest ill-health in the extractive sector.¹¹² Continued abstinence could signal an unhealthy commitment to secrecy where transparency should serve as a vehicle for redress and job creation in an industry that has historically been exploitative.

5.3.2 Curtailing of labour unrest in the extractive industry

The issue of labour unrest has proven to be particularly pervasive within the South African mining context. Without question, the variables precipitating labour agitation within the country's extractive industries are highly complex and multi-layered. According to the website of Laud Of War, explanations provided by workers for their grievances expose systematic problems which continue to exist within the sector.¹¹³

Once heralded for its collective bargaining abilities and inclusiveness, South African labour unions are increasingly being accused of assuming a more authoritarian guise and having leadership structures which are failing to engage its membership in key decision-making.¹¹⁴ Competitiveness between rival unions seeking to dominate the sector has also sowed division which has further complicated negotiations. A collective governance platform enabling the labour sector to couple activism with engagement may be able to limit labour conflict and mitigate the risks associated thereto.

5.3.3 Protection of civil society rights and local community interests

Policy reforms within South Africa's mining industry are often created and implemented without the consultation of mining communities who also continue to be marginalized from deriving any tangible benefits from the country's natural resources.

The EITI has come a long way towards protecting the voice of civil society in the countries in which it

¹¹¹ Corruption Watch (2012). "The other cost of corruption" 21 January 2012 Corruption Watch.

¹¹² Holmes (2013) 3.

¹¹³ Polsecanalyst (2015). "South Africa and the curious case of the EITI" 10 February 2015 Laud of War.

¹¹⁴ *Ibid.*

operates. During the 35th International Board meeting of the EITI that took place in Astana, Kazakhstan in October 2016, the Board had to deliberate the decision on whether or not to suspend Azerbaijan from the EITI due to restrictive legislations on civil society activities in that country.¹¹⁵

Through the activities of the EITI, and in order to avoid suspension, Azerbaijan is now forced to reform domestic laws and policies in order to ease the registration of civil society organizations and allow them to receive foreign funding before the next Board meeting in February 2017. The collective governance approach of the EITI will afford local South African mining communities a similar seat at the table and an opportunity to make a meaningful contribution to the process.

5.3.4 Identification of cronyism

The South African government has been accused of engaging in cronyism and having vested personal interests within the sector which is further hampering much needed industry reforms.¹¹⁶ Deals are often engineered by politically protected ‘tenderpreneurs’ who swindle the poor by securing contracts that benefit a narrow band of political elites. The DA warns that it is imperative that government step up to the transparency plate and lead the African continent out of its ‘resource-course’ and refute the continued perception of protecting the narrow interests of a small group of political elites.¹¹⁷

5.3.5 Attracting foreign investment

Stock markets thrive on transparency ensuring open information equally available to all. Expanding financial capital and ensuring stability of the investment market of the extractive industry in South Africa, rests on information disclosure and transparency. As reported by Adeleke and Ward, it is therefore hardly surprising that increased transparency efforts within the financial market have been pushed by industry players themselves, as well as international organisations such as the International Monetary Fund, the World Trade Organization and the World Bank, as such efforts are “self-beneficial to the expansion and stability of this market”.¹¹⁸

¹¹⁵ Publish What You Pay News (2016). “EITI reaffirms its commitment to protecting independent voices at its Astana Board Meeting” 26 October 2016 PWYP.

¹¹⁶ Polsecanalyst (2015).

¹¹⁷ Lorimer (2012).

¹¹⁸ Adeleke & Ward (2015) 32.

There is a direct connection between the availability of relevant information and increased investment (including foreign direct investment (FDI)). As represented in the National Development Plan and in the Medium Term Strategic Framework for 2014 until 2019, released in August 2014, investment and FDI constitute important aspects of South Africa's overarching development plans.¹¹⁹ As such, FDI holds a significant place within the politics and economy of South Africa, and particularly with regard to the growth of the mining industry, whose potential to contribute to the economy is, according to the National Treasury, contingent on higher rates of investment.¹²⁰

Given that any investment decision relies on the availability of information and the quality of such information, the business case for transparency is directly related to the extent to which it can bring about financial growth.¹²¹ The existence of Foreign Direct Investment may not be an indispensable condition for South Africa's economic growth, but it certainly contributes to more equitable development that can be facilitated through a particular focus on transparency in extractive industries.

5.3.6 Clarification of roles and responsibilities of government and business

Public functions are frequently transferred to private companies in South Africa. The Social and Labour Plan (SLP) system, for instance, requires companies to undertake initiatives that fall within government's core responsibilities of local economic development and basic service provision.¹²² Companies must further adopt infrastructure and income-generating projects that align with municipalities' Integrated Development Plans (IDPs).¹²³

This partial transferral of duties creates the risk of a confusion of roles and responsibilities that allows both companies and government to shift responsibility for non-delivery on commitments made. It would make sense to ensure a higher level of transparency pertaining to these projects to ascertain accountability and respective responsibilities in relation thereto.¹²⁴

¹¹⁹ South Africa (2014). Department of Planning, Monitoring and Evaluation. *Medium-Term Strategic Framework (MTSF 2014-2019)* 4. Department of Communications.

¹²⁰ South Africa (2013). National Treasury. *National Treasury Budget Review 2013* 18. 27 February 2013.

¹²¹ Adeleke & Ward (2015) 33.

¹²² The Constitution (1996). Functions conferred by section 156, read with Part B of Schedules 4 and 5.

¹²³ MPRDA (2002). Regulation 46(c) of the MPRDA Regulations referring section 3 of the SLP Guidelines.

¹²⁴ Snyman & Krause (2015) 19.

5.3.7 Geopolitical benefits

Dr Oladiran Bello, the Head of the Governance of Africa's Resources Programme, in his article *SA can cast light on dark side of mining*, questions if South Africa is failing to recognize its own self-interest and potential geopolitical advantages in joining the EITI.¹²⁵

Before Australia made the final decision to sign up to the EITI, a two-fold argument was made in support of the initiative.¹²⁶ The first pertained to the right of Australians to know and question the flow of revenues between extractive companies and the government, and the second was that Australia, as one of the most resource-rich developed countries within the OECD should lead by example in adopting the EITI to verify transparent, efficient revenue collection and oversight of its extractive industries.

South Africa is Africa's largest economy and it is usually the 'prime mover' for OECD activities supporting the objectives of NEPAD¹²⁷, especially in Southern Africa, on taxation, investment, competition policy and governance. As the OECD and South Africa deepen their collaboration, South African policy makers gain access to OECD expertise and good policy practices - the OECD, in turn, benefits from exposure to South African policy perspectives, to enhance mutual learning.¹²⁸

Bello argues that "...the EITI could provide a platform for South Africa's pursuit of middle power aspirations, including by mediating international norms... (and by exerting)... soft power and influence".¹²⁹ An active and expanding South African role in the EITI potentially opens up channels for its domestic regulatory best practices to be regionalized or even globalized.

Furthermore, as none of the BRICS¹³⁰ countries are currently signatories to the EITI, South Africa, by initializing the process, has the opportunity to assume a leadership role as far as transparency in the extractive sector of these countries are concerned.

¹²⁵ Bello (2013). "SA can cast light on dark side of mining".

¹²⁶ Sturman (2015).

¹²⁷ The New Partnership for Africa's Development (NEPAD) is an economic development program of the African Union. NEPAD was adopted at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia with South Africa acting as one of the founding members.

¹²⁸ South Africa and the OECD. Retrieved from the SA-OECD website (accessed on 22 November 2016).

¹²⁹ Bello (2013). "SA can cast light on dark side of mining".

¹³⁰ Brazil, Russia, India, China and South Africa.

5.4 SUMMARY OF VIEWPOINTS

Whilst protagonists are of the opinion that a South African EITI can bridge the divide between government, civil society and the mining sector, the South African parliament continues to dismiss adopting a standard that will allow citizens to see for themselves how much the government is receiving from the country's natural resources.

The Democratic Alliance's James Lorimer, strongly urged the South African government to join the EITI, warning that refusing to do so undermines investment in an already fragile industry through increasing political risk. This, according to Lorimer, will result in reputable mining houses being replaced by those who have no concern for job creation and environmentally sustainable mining.¹³¹

With labour agitation increasing, and South Africa's extractive industry declining, the need for greater reform and transparency has become a necessity. Increased transparency in the industry will not only support a collective governance approach required to find solutions to many of the current problems experienced, but will also increase the country's attractiveness for foreign direct investment and hopefully create the necessary conditions which will no longer see the mining industry being viewed as a microcosm for exploitation and unequal wealth distribution.

Recognizing South African officials' argument professing the advanced nature of South African extractive industry legislation and oversight mechanisms, the country will further be able to bring something unique to the EITI by sharing this experience with its African peers.

As stated by Oladiran Bello "...the ideological argument with which South Africa's rejection of the EITI has often been suffused obscures the advantages and potential self-interest in joining".¹³²

5.5 CONCLUSION

The chapter explores the validity of the main arguments in support of and in opposition to the implementation of a South African EITI. In practice none of the existing governance instruments represent a viable structure through which the public can hold government and extractive companies accountable when it comes to resource exploitation and revenue flows.

¹³¹ Lorimer (2012).

¹³² Bello (2013). "South Africa should leverage the Extractive Industry Transparency Initiative (EITI)".

In summary, whether legal or voluntary, there is no single coordinated mechanism in the South African extractive industries sector that promotes the proactive and timely public disclosure of information on state-company payments and the verification of revenues paid and received. This suggests that there is no alternative to the EITI at the national level in South Africa.

The only legitimate argument against the implementation of the EITI appears to be around the question of the relevancy thereof. To stay at the cutting edge of extractive sector reform and empower participation from all stakeholders, the EITI would need to continuously develop and evolve according to the needs of its participating countries.

The next, penultimate chapter evaluates the information obtained against the research questions and objectives formulated in the first chapter and provides a summary of the viewpoints and suitability of the EITI as an instrument towards effective collective governance of South African extractive industries.

CHAPTER 6

EVALUATION AND SUMMARY

6.1 COLLECTIVE GOVERNANCE OF SOUTH AFRICAN EXTRACTIVE INDUSTRIES

Collective governance has the potential to contribute to a collaborative and consensus-orientated decision-making process in the South African extractive industry sector. This will undoubtedly improve transparency and accountability of revenue management in the sector to support inclusive growth and sustainable development of the country.

Collective governance is however not a panacea for all the problems of South Africa's extractive industries, and can be a demanding, time-consuming process that may potentially be dominated by some stakeholders and used to manipulate others. Rich and Moberg concede that there are limited areas of governance suitable to a collective governance approach and moreover, worthy of justifying the extensive efforts associated thereto.¹³³

The management of extractive industries is however a fitting example of a South African sector ideally suited to collective governance solutions. A collaborative approach, providing broad-based participation and transparent decision-making processes with outcomes of mutual benefits to all stakeholders, may very well offer solutions to some of the most complex and intractable issues affecting the industry in the country.

6.2 IMPROVING COLLECTIVE GOVERNANCE THROUGH THE EITI

The ultimate success of collective governance rests on the three critical pillars of transparency, accountability and stakeholder participation, which elements are anchored in most multi-stakeholder initiatives (MSIs). Although transparency is not a solution in itself, it certainly is a means to an end. Consequently, the emphasis in respect of transparency imperatives in the extractive sector is on what transparency can actually achieve. This debate has progressed beyond a reactive perception that disclosure of information must be used in seeking redress of wrongs, to a proactive approach whereby increased transparency translates into good business decisions for countries. The implementation of sound transparency initiatives has therefore become an issue of global strategic importance.

¹³³ Rich & Moberg (2015) 146.

Against this background the Extractive Industries Transparency Initiative (EITI) operates as a multi-stakeholder initiative, fostering dialogue between key stakeholders, with the aim of generating increased transparency of financial flows between mining companies and governments. This ultimately allow citizens to see for themselves how much their government is receiving from the extraction of their country's natural resources, effectively contributing to bridging the divide between governments, the extractive business sector, labour representatives and affected communities.

Criticism leveraged against the EITI relating to its narrow application and relevance, and the unrelenting efforts of organizations like Publish What You Pay and the Right2Know campaign, have contributed to the continued development of the standard ensuring that it remains the premier global standard for openness and accountability in natural resources governance.

6.3 CURRENT DEFICIENCIES IN THE EITI

It is evident that continued development of the EITI is required. In the absence of certain issues like environmental assessments and impact being adequately addressed, many civil society organizations may choose to pursue their agendas through advocacy channels other than the EITI.

As the EITI represents a rare opportunity for many civil society organizations to sit at the same table as government officials, the aims and objectives of the standard would be greatly enhanced by expanding the focus to include, develop or ensure better enforcing of the following:¹³⁴

- Improved measures to achieve corruption control;¹³⁵
- Timely and actionable project-level financial data;
- Ownership disclosure to address the negative impact of anonymous shell companies that facilitate corruption;
- Contract and procurement disclosure;
- Social and environmental information disclosure;¹³⁶

¹³⁴ Oxfam International (2016). Areas of concern compiled from input submitted by Oxfam joining the PWYP coalition in calling for the implementation of the recommendations to review the EITI.

¹³⁵ Kasekende, E., Abuka, C., & Sarr, M. (2016). "Extractive industries and corruption: Investigating the effectiveness of EITI as a scrutiny mechanism" 125. *Elsevier: Resources Policy* 48.

¹³⁶ Sequeira, A.R., McHenry, M.P., Morrison-Saunders, A., Mtegha, H., & Doepel, D. (2016). "Is the Extractive Industry Transparency Initiative (EITI) sufficient to generate transparency in environmental impact and legacy risks? The Zambian minerals sector" 435 *Elsevier: Journal of Cleaner Production* 129; Oge, K. (2016) "Which transparency matters? Compliance with anti-corruption efforts in extractive industries" 49 *Elsevier: Resources Policy* 49.

- Prioritization of the protection of citizen space to address the shrinking civic space and restrictions on civil society in many EITI countries; and
- Weaknesses in the governance of the EITI Board and the management of its secretariat.

6.4 IMPLEMENTING EITI TOWARDS IMPROVED COLLECTIVE GOVERNANCE OF SOUTH AFRICAN EXTRACTIVE INDUSTRIES

Although transparency, as one of the core elements to successful collective governance, has a constitutional and human rights grounding within South Africa, it currently lacks the necessary application to ensure justice and equality (through accountability) for the people of the country.

Whilst a strong business case exists for increasing transparency practices, and the associated financial growth through investment is certainly significant, transparency efforts in South Africa also need to be sustainable, equitable and accountable to both the labour sector and local communities in order to ensure that South Africa's development targets are met and are in line with the Constitution.

The big strength of the EITI lies in providing basic information that leads to further engagement between government, business, labour and communities. Given that the EITI is continuously evolving, it provides a suitable platform to facilitate a concurrent focus on civil society empowerment and resource governance agendas aimed at poverty reduction and sustainable development outcomes at local community level.

6.5 STAKEHOLDER PARTICIPATION THROUGH THE EITI

The realisation of good governance practices within the public sector of South Africa is not an unattainable goal, but it would necessitate a collective effort towards increased transparency and accountability. It is therefore imperative that all South Africans accept that the stability of the state, the provision of services, and the enhancement of the livelihoods of all South Africans are objectives worth fighting for.¹³⁷

It is not only government who should be responsible for ensuring that revenues derived from extractive industries are optimally utilised towards the benefit of all South Africans. As such the implementation of a South African EITI will provide all extractive industry stakeholders the opportunity

¹³⁷ Mosselini (2013) 56.

to realise the key role they have to play. The EITI will be able to level the playing field by ensuring crucial participation of ordinary people, and a general public which is more geared towards the cleaner governance of South Africa. This in turn will ensure a more proactive stance towards transparency, accountability and the combating of corruption.

CHAPTER 7

CONCLUSION AND RECOMMENDATION

The extractive industry is arguably the sector in South Africa which is most susceptible to strife and conflict due to the differing viewpoints and contradictory agendas of the various contributory stakeholders. The deaths of the 34 men at Marikana in 2012 still haunts South African society, partly due to the eerie resemblance of this tragic event to the apartheid government's heavy-handedness with regard to industrial disputes and the perception of collusion with private companies. It is evident that South African extractive industries continue to experience challenging issues, including dysfunctional development policies, weak regulations and institutions, low financial transparency and accountability, widespread corruption and mismanagement of revenues from extractive resources.

It is therefore no coincidence that one of the core themes continuously raised at the annual African Mining Indaba is the focus on creating greater transparency within the mining sector. The blunt statement in a recent article in the *Mining Weekly*¹³⁸ warning that, against the background of the recently released 'State of Capture' report of former Public Protector Thuli Madonsela, South Africa can "...kiss meaningful, honest mining investment goodbye until it pulls itself right...", highlights the importance of governance by way of broader based economic and social progress.

Where the South African extractive labour industry has succeeded in forming strong associations by way of labour unions and factions, local communities are proceeding to rally their support towards their unified causes and are emerging as a dynamic force that cannot be ignored. In an attempt to satisfy the ever increasing demands from both these groups, the South African government is placing additional financial and developmental burdens at the door of extractive companies.

Continued criticism is however leveraged against the South African government by all affected stakeholders reflecting a general dissent in relation to current governance of the extractive industry. Having the appropriate governance regime would play an instrumental role in enhancing efficiency of management of extractive resources and could facilitate the transformative role of collaborative governance in the industry.

¹³⁸ Creamer, M. (2016). "DMR must be challenged, good governance must be assured" 7 November 2016 *Mining Weekly*.

South Africa's implementation of the Extractive Industries Transparency Initiative (EITI) will show a commitment to a long term change in government's respect for fundamental civil liberties, (including freedom of association and expression), reflecting a genuine reform to contribute to enabling a meaningful public debate around the governance of natural resources in the country. All players are essential to the effective functioning of the extractive industry and the EITI's integrated, consultative and public-participation process will ensure that interested stakeholders can play an effective oversight role validating the transparency around revenues paid and received from the sector.

The debate on whether South Africa should join the EITI should however not revolve around ideological and diplomatic arguments, but should rather focus on practical ways in which to use the initiative as a step towards securing transparency and accountability in the extractive sector. Transparency is the principle that will allow the country to truly benefit from its resources, by ensuring that revenue generated through these resources is directly channeled to priority sectors, allowing a harmonious development of the South African people.

The recent launch of the PWYP-SA coalition will undoubtedly deliver unrelenting demands towards the implementation of the EITI, which is anticipated to have a positive impact on the development of effective collective governance of extractive industries in the country, and will certainly further investment, diplomatic and other interests in the EITI-compliant jurisdictions around Africa and beyond. As the leading investor in the extractive sector on the African continent (which historically includes some of the most corrupt regimes) it's only logical that South Africa should lead the way in transparency-related initiatives. Joining the EITI would be a powerful message to all and sundry about the country's unflinching commitment to good governance and support effective collective governance of the extractive industry sector in South Africa.

The 'New South Africa's' defining characteristic is its success in creating a constitutional democratic state from a hostile, diverse legacy, characterized by institutional violence. Enhanced transparency and accountability in the extractive sector may also be within reach by ensuring broad consultation and inclusiveness, particularly of those lying at the extreme ends of the political, class and interest spectrum. South Africa's government (through its parliament and executive), civil society (represented by both labour and community) and private sector industry, ought to re-enter a dialogue about the potential benefits associated with the implementation of the EITI.

In the quest for win-win solutions, in which business objectives are pursued concurrently with those of other stakeholders, a multi-stakeholder initiative like the EITI epitomises the concept of a collaborative partnership. The EITI, as a quadri-sector partnership engaging the strengths of extractive companies alongside those of labour unions, community representatives and government, can make a significant contribution towards demonstrating that effective collective governance in the management of South Africa's natural resources contributes to true development.

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